Supreme Court, U.S.
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No. 86 1484

IN THE

Supreme Court of the United States

October Term, 1987

TIP TOP FARMS, INC.,

Petitioner,

v.

DAIRYLEA COOPERATIVE INC.,

Respondent.

JEROME DAIRY, INC.,

Petitioner,

v.

DAIRYLEA COOPERATIVE INC.,

Respondent.

PARK LANE DAIRIES, INC. and PARK DALE DAIRIES, INC.,

Petitioners,

v.

DAIRYLEA COOPERATIVE INC.,

Respondent.

(Continued on inside cover)

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS PRESENTED

1. May a state court bar an indirect purchaser from proceeding against a direct purchaser on theories of implied contract and money had and received to recover a portion of an antitrust recovery obtained by the direct purchaser from an antitrust violator when the indirect purchaser is prevented from recovering directly from the antitrust violator under principles enunciated by this Court in *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)?

2. Does a requirements contract under which the purchaser is not obligated to purchase a fixed quantity of goods fall within the "cost-plus" exception recognized in *Illinois Brick*?

STATEMENT OF AFFILIATIONS

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, respondent Dairylea Cooperative Inc. states that it has three wholly-owned operating subsidiaries, Hudson Valley Dairy Distributors, Inc., Sunny Valley Farms, Inc. and Agri-Service Agencies, Inc. Dairylea has other subsidiaries but they are all non-operating companies.

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STATEMENT OF FACTS

These three state-court actions, each commenced in late 1980, involve nearly identical factual allegations and theories of recovery. Each of the petitioners is a milk dealer which purchased processed milk and milk products from respondent Dairylea Cooperative Inc. ("Dairylea") at various times from 1960 to 1981. Each petitioner seeks to recover a portion of a monetary settlement received by Dairylea in 1980. The settlement arose out of an antitrust class action entitled *In Re Folding Carton Anti-Trust Litigation* commenced in the United States District Court, Northern District of Illinois. The defendants in that class action were fiberboard manufacturers who conspired from 1960 to 1974 to fix the prices of folding cartons and to allocate customers among themselves.

Dairylea was a member of the plaintiff class in the antitrust action and was notified in 1979 that the fiberboard manufacturers had consented to settle the action for approximately $200 million. Dairylea was instructed to submit a claim based upon its fiberboard purchases from the antitrust defendants in any four years from 1960 to 1974. Dairylea thereupon submitted a claim to the Federal District Court which showed the dollar amount of its total purchases of fiberboard containers in the years 1971 - 1974, inclusive.

Dairylea's claim was accepted by the District Court after being modified by an Administration Committee appointed by the Court. In early 1980, Dairylea received its portion of the final antitrust settlement in the form of (1) a check in the amount of $1,165,981.52; (2) two non-interest bearing subordinated promissory notes due October 18, 1983 in the amounts of $29,000 and $100, respectively; and (3) one warrant certificate entitling Dairylea to purchase 291 shares of common stock of Federal Paperboard Company, Inc.

Petitioners commenced these actions in New York Supreme Court seeking to obtain a share of Dairylea's settlement recovery. Each of the petitioners alleged that it had an oral contract with Dairylea to purchase milk and milk products from Dairylea in cardboard containers. The price of the packaged milk, it was alleged, contained a separate component charge for the containers which was equal to Dairylea's cost of the containers plus 1%. Petitioners claimed that oral communications between them and Dairylea established that petitioners would be reimbursed for amounts received by Dairylea reducing its cost of the containers.

Petitioners conceded that there was no express agreement by Dairylea to remimburse them for any retroactive adjustments in the cost of the cardboard cartons. They instead sought to *imply* such an obligation from the oral contracts based solely on the fact that the cartons were to have been sold at Dairylea's cost plus 1%. An antitrust recovery of overcharges, petitioners admitted below, was not even within the contemplation of the parties when they entered into their oral arrangements.

The complaints of the respective petitioners alleged causes of action for an accounting, for breach of contract, and for monies had and received. Petitioners later abandoned their causes of action for an accounting.

Dairylea moved in 1982 to amend its answers, and for summary judgment dismissing the respective complaints. Each of the petitioners cross-moved for summary judgment.

The New York Supreme Court, Queens County, granted Dairylea's motions for summary judgment upon the ground that a recovery by the petitioners would frustrate federal antitrust policy as enunciated by the U.S. Supreme Court in *Illinois Brick*. Each of the complaints was dismissed in its entirety (except a portion of the complaint in the action by petitioner Tip Top Farms, Inc. which sought to recover a portion of manufacturers' discounts allegedly received by Dairylea).

The New York Supreme Court, Appellate Division, Second Department affirmed the grant of Dairylea's motions for summary judgment. *Tip Top Farms, Inc. v. Dairylea Cooperative Inc.*, 114 A.D.2d 12, 497 N.Y.S.2d 99 (2d Dept. 1985) (Appendix B to Petitioners' Petition). The Appellate Division concured in the conclusion that maintenance of these actions would violate policies expressed by the U.S. Supreme Court and would frustrate the enforcement of the antitrust laws by private litigants.

The New York Court of Appeals affirmed the order of the Appellate Division for reasons stated in the opinion of the Appellate Division. *Tip Top Farms, Inc. v. Dairylea Cooperative Inc.*, 69 N.Y.2d 625, 511 N.Y.S.2d 227 (1986) (Appendix A to Petitioners' Petition).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI.

POINT I

THE COURTS BELOW APPLIED WELL SETTLED RULES OF FEDERAL PREEMPTION WHICH NEED NOT BE REVIEWED BY THIS COURT.

Congress has not, as petitioners point out, completely displaced state regulation in the antitrust area. However, even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. *Fidelity Federal Savings and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022, 73 L. Ed.2d 664 (1982). When it is impossible to comply with both state and federal law or where state law stands as an obstacle to accomplishment of the full purposes and objectives of Congress, state law is preempted. *Silkwood v. Kerr-McGee*, 464 U.S. 238, 248, 104 S. Ct. 615, 621, 78 L.Ed.2d 443 (1984).

These general principles apply equally to state-created remedies and causes of action. If a state remedy is inconsistent with the policies of a federal law, a plaintiff will be prohibited from recovering on the state cause of action. *Sears, Roebuck & Co. v. Stiffel*, 376 U.S. 225, 84 S. Ct. 784, 11 L.Ed.2d 661 (1964); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *cert. den.*, 55 U.S.L.W. 3474, 107 S. Ct. 907, 93 L.Ed.2d 857 (1987).

The New York courts properly recognized the conflict between petitioners' state common law action and federal law and policy. Petitioners' causes of action based on common law implied contract and money had and received clash with the objectives of federal antitrust law and policy as interpreted by this Court in *Illinois Brick*.

The maintenance of these actions by petitioners would reduce, if not destroy, the effectiveness of the private treble damage action as a viable means of enforcing the antitrust laws. No direct purchaser hereafter would be willing to commence or participate in a treble damage action, and incur the costs and expenses associated with such an action, if it knew that its customers could turn around and lay claim to all of the recovery on the basis of an implied contract or on an equitable theory of money had and received.

This threat to the enforcement of the antitrust laws was aptly observed by the New York Supreme Court, Appellate Division, below:

> A direct purchaser confronted with the prospect of having to defend its recovery fund against the claims of its customers merely because the illegal overcharge had been passed on to its customers by reason of a cost-plus provision in a requirements contract may readily find the role of private Attorney General too burdensome to warrant the massive expenditure of time and money. The conclusion that such a suit necessarily weakens - and

> at the extreme eliminates - the incentive of the direct purchaser to act as a private Attorney General is derived from two economic observations. First, in the absence of a preexisting, fixed quantity, cost-plus contract or an indirect purchaser's ownership or control of the direct purchaser, the problem of apportioning damages among direct and indirect purchasers would be costly, due to the litigation expenses and complex evidentiary problems entailed in proving the amount of the overcharge that had been passed on to the indirect purchaser. Second, even if allocation problems could be solved without seriously depleting the recovery pool, after the recovery is divided among the direct purchaser's customers, the amount of damages, if any, the direct purchaser is allowed to retain would be relatively small (*see* Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick,* 46 U Chi L Rev 602, 608-615). The net effect is to significantly impair the direct purchaser's incentive to institute or prosecute a Federal antitrust action against his supplier or to file a claim in a pending class action for treble damages.

Tip Top Farms, Inc. v. Dairylea Cooperative Inc., 114 A.D.2d at 24-25, 497 N.Y.S.2d at 106-107 (Appendix B at B17-B18).

The dangers inherent in permitting petitioners to proceed cannot be more succinctly stated. A direct purchaser would have little incentive to initiate or participate in an antitrust action if it is compelled to pay over the recovery to those further down the distribution chain, all the while incurring litigation expenses in determining which indirect purchaser gets how much. The private enforcement of the antitrust laws would be dealt a major blow if actions such as these were permitted to go forward.

POINT II

PETITIONERS' RELIANCE ON THE COST-PLUS EXCEPTION RUNS COUNTER TO THE HOLDINGS OF THIS COURT AND OTHER FEDERAL COURTS.

The petitioners have sought to invoke an exception to the prohibition against the use of the "passing on" theory which was recognized in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968), and in *Illinois Brick*. The exception applies to indirect purchasers who purchase their goods pursuant to a pre-existing "cost-plus" contract for a *fixed quantity* of goods. This exception was created because the difficulties associated with proving the "passing on" theory are less significant when the goods are purchased under a fixed quantity cost-plus contract. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494, 88 S. Ct. 2224, 2232, 20 L. Ed 2d 1231 (1968). Sellers under fixed quantity cost-plus contracts are insulated from any decrease in sales as a result of attempting to pass on overcharges because customers under such contracts are committed to buying a fixed quantity regardless of price. Thus, the effect of the overcharge is determined in advance, without reference to the interaction of supply and demand that complicates the determination in the ordinary case. *See Illinois Brick Co. v. Illinois,* 431 U.S. at 736, 97 S. Ct. at 2069-70.

The courts have been unanimous in holding that a "fixed quantity commitment" is essential to establishing the cost-plus exception. *Lefrak v. Arabian American Oil Co.*, 487 F. Supp. 808, 822 (E.D.N.Y. 1980); *see also Mid-West Paper Products Co. v. Continental Group,* 596 F.2d 573, 576-77 (3d Cir. 1979); *In Re Midwest Milk Monopolization Litigation,* 529 Supp. 1326, 1332 (W.D. Mo. 1982), *aff'd,* 730 F.2d 528 (8th Cir. 1984), *cert. den.,* 469 U.S. 924, 105 S. Ct. 306, 83 L.Ed.2d 240; *Int'l Ass'n of Machinists v. OPEC,* 477 F. Supp. 553, 562 (C.D.Cal. 1979), *aff'd,* 649 F.2d 1354 (9th Cir. 1981), *cert. den.,* 454 U.S. 1163, 102 S. Ct. 1036, 71 L.Ed.2d 319.

A requirements contract is the antithesis of a fixed quantity contract inasmuch as a buyer's requirements will vary with supply and demand. Since demand is affected by increases in price, requirements contracts lack the certainty of fixed quantity contracts.

The lack of a fixed quantity commitment in petitioners' requirements contracts makes it impossible to determine with any degree of certainty how much of the fiberboard manufacturers' price overcharges were passed along to petitioners. Because demand for milk is elastic, and because petitioners were not required to purchase fixed quantities of milk, Dairylea was not insulated from decreases in sales due to the manufacturers' higher prices, and could well have -- and indeed did -- absorb some of the overcharges itself. To what extent Dairylea absorbed the overcharges is an issue which gives rise to "evidentiary complexities due to considerations of decreasing sales", *Int'l Ass'n of Machinists v. OPEC*, 477 F. Supp. at 562, which is precisely what the cost-plus exception was intended to avoid.

The New York courts properly applied this Court's analysis of the narrow scope of the cost-plus exception to *Hanover Shoe* and *Illinois Brick*. This Court need not review an issue it has fully explicated in prior decisions and on which the lower courts have unanimously agreed.

POINT III

THE FACT THAT OTHER STATE LEGISLATURES HAVE CREATED A STATUTORY REMEDY FOR INDIRECT PURCHASERS IS IRRELEVANT.

Petitioners point out that legislatures in some states have created a remedy under state law for indirect purchasers. Although the validity of those statutes has been questioned (*see* Note, *State Indirect Purchaser Statutes: The Preemptive Power of Illinois Brick*, 62 B.U.L. Rev. 1241; Note, *Indirect Purchaser Suits Under State*

Laws: A Detour Around the Illinois Brick Wall, 34 Stan. L. Rev. 203 (1981); Cavanagh, *The Illinois Brick Dilemma: Is There A Legislative Solution?,* 48 Alb. L. Rev. 273 (1984)), those statutes have no bearing on this case. What other state legislatures have done in regard to indirect parties is irrelevant. Those statutes are not at issue here and their validity was not addressed in the opinion below.

POINT IV

THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE CITED DECISIONS OF THE NINTH CIRCUIT.

Petitioners cite a conflict between decisions in the Ninth Circuit and the New York Court of Appeals decision in this case. No such conflict exists. In *Cal v. Cal. & Hawaiian Sugar Co.,* 588 F.2d 1270 (9th Cir. 1978), *cert. den.,* 441 U.S. 932, 99 S. Ct. 2052, 60 L.Ed.2d 660 (1979), the Ninth Circuit stated that it is possible under state law that an indirect purchaser might have a viable cause of action. The court recognized that states should be free to settle the question. New York courts have settled the question in the instant case by determining that the facts of this case preclude a state court action sounding in implied contract.

Nor is *Alton Box Bd. Co. v. Esprit De Corp.,* 682 F.2d 1267 (9th Cir. 1982), in conflict with the decision in the instant case. In *Alton Box,* the court stated that the manufacturers could properly raise the *Illinois Brick* preemption issue as a defense to an action based upon state law. *Id.* at 1274. Furthermore, the court recognized the possibility that the indirect purchasers' claim may be preempted by federal law. The Ninth Circuit did not hold that state law claims could not be foreclosed by *Illinois Brick.*

The New York Court of Appeals made clear that not all common law breach of contract claims are barred by *Illinois Brick,* but it properly held that, in the absence of an *express agreement,* an

indirect purchaser under a requirements contract could not bring an action to recover its pro rata share of antitrust damages from the direct purchaser. This holding does not conflict with the cited decisions of the Ninth Circuit.

POINT V

THE RULING OF THE NEW YORK COURT OF APPEALS HAS LIMITED IMPACT DUE TO THE PARTICULAR FACTS INVOLVED.

The petition for a writ of certiorari should be denied since it is improbable that similar questions of law will arise in the future. The preemptive effect of *Illinois Brick* on state law remedies arises only due to the presence of the following facts and circumstances:

(a) Petitioners and Dairylea entered into an oral agreement whereby Dairylea agreed to supply petitioners their requirements of milk in cardboard milk containers on a cost-plus basis;

(b) The oral agreement, by petitioners' admission, did not contemplate Dairylea's receipt of price overcharges based upon its prior purchases of cardboard cartons and did not expressly provide for Dairylea to share its recovery with petitioners;

(c) Years after the sale of the milk in question, Dairylea recovered a portion of a monetary settlement settling a price fixing action against cardboard manufacturers; and

(d) The antitrust settlement did not delineate how much of the settlement was attributable to price overcharges and how much was attributable to treble damages and costs.

In order for the issues involved in this action to arise again in the future, each of the foregoing facts must be present. Because of the particular facts underlying this action, it is unlikely that this

issue will recur frequently in the future. Accordingly, the ruling below will have limited effect and applicability, and need not be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied. The New York courts properly recognized that petitioners were seeking to accomplish indirectly what this Court prevented them from doing directly, namely, recovering for overcharges resulting from the manufacturers' price-fixing conspiracy.

Respectfully submitted,

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